No. 75-1304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

AMERICAN PUBLIC GAS ASSOCIATION,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner American Public Gas Association ("APGA") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 520 F.2d 1061 and its *per curiam* order denying rehearing is reported at 525 F.2d 1261. These decisions are set forth in Appendices A and B, respectively, of the Appendix to Petition for Certiorari of California Company, A Division of Chevron Oil Company.[1] The initial

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[1] In the interest of simplicity, each party filing a petition for certiorari has agreed to utilize the appendix of California Company for the reprinting of the opinions of the court of appeals and of

[Footnote continued]

order (Opinion No. 699) of the Federal Power Commission ("FPC" or "Commission") and its order (Opinion No. 699-H) denying rehearing are set forth in Appendices C and D, respectively.

JURISDICTION

The judgment of the court of appeals (Appendix A) was entered on October 14, 1975. On January 5, 1976, Justice Powell extended APGA's time for filing a petition for writ of certiorari to and including March 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission erred in establishing a national rate for new natural gas without holding an evidentiary hearing on the complicated factual issues involved in such a decision in view of (1) the requirement of "full hearings" contained in Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. § 717c and d, (2) the requirement of "substantial evidence" contained in Section 19(b) of the Act, 15 U.S.C. § 717r(b), (3) the right of "cross-examination" contained in Section 1.20(g)(1) of the FPC's Rules of Practice and Procedure, and (4) the fact that the rate set without a hearing doubles the area rate approved by this Court in *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974), which was based on a full evidentiary hearing record.

2. Whether the Court of Appeals erred in utilizing a less demanding "kid glove" review standard by which it

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[1] [Continued]
the Federal Power Commission which are the subject of this petition and of the relevant sections of the Natural Gas Act, 15 U.S.C. § 717, *et seq.*, denominated as Appendices A through E. APGA has attached additional appendices to the instant petition, denominated as Appendices F and G.

upheld the arbitrary actions taken by the Commission, *inter alia*, (1) of permitting admittedly low cost, "flowing" gas to receive the "new" gas rate if the original contract has expired and a renewal contract has been executed and one of these events occurred on or after January 1, 1973, (2) of abandoning the cost methodology approved by this Court in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), in favor of the untested discounted cash flow ("DCF") methodology, (3) of approving an admittedly understated net liquid credit, and (4) of utilizing admittedly unreliable, understated industry-supplied reserve data to determine the appropriate productivity figure, none of which actions were supported by "substantial evidence" in the record as required by Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

3. Whether the Federal Power Commission erred in permitting the national rate for new gas to be collected for the sale of flowing gas where fortuitously the original contract has expired and a renewal contract has been executed, one of which must have taken place on or after January 1, 1973, since such occurrences are irrelevant and since there is no record evidence of any cost increase above prior fully-adjudicated levels for such flowing gas, thereby in effect accomplishing a limited *de facto* deregulation of gas without complying with the standards of the Natural Gas Act for "just and reasonable" rates.

STATUTES INVOLVED

Sections 4, 5, 7, and 19 of the Natural Gas Act, 15 U.S.C. §§ 717c, d, f, and r, are set forth in Appendix E. Sections 553, 556, 557, and 706 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553, 556, 557, and 706 are set forth in Appendix F, *infra*.

STATEMENT

1. The present case involves the largest rate increase to American consumers ever granted in the history of the United States and the first to be made without an evidentiary hearing. On April 11, 1973, the FPC issued a "Notice of Proposed Rulemaking and Order Prescribing Procedures" stating, *inter alia*, its intent to set a single uniform nationwide rate for new natural gas based upon untested submittals without benefit of trial-type adjudicatory procedures, which had been the basis for every Section 4 and 5 ratemaking proceeding since the inception of the Natural Gas Act in 1938.[2] Under the informal rulemaking procedures, APGA was limited to filing initial and reply comments on May 16, 1973 and June 1, 1973 in which it vigorously contended that an evidentiary hearing with cross-examination was necessary, not only because the Natural Gas Act required such a proceeding, but also because, as a practical matter, since all of the necessary data on costs and reserves, which are absolutely essential to setting the "just and reasonable" rates mandated by Section 4 of the Natural Gas Act, are peculiarly and exclusively in the hands of the natural gas producers, i.e., the regulated industry, APGA and other consumer representatives would be unable to effectively challenge the data which the producers chose to present without the right to test such information through cross-examination.

On March 21, 1974, the Commission issued a "Notice of Issuance of Revised Staff Nationwide Cost Study and Staff Study of American Gas Association Reserve Additions."[3] In this study, the Staff, after reviewing data on only 31 selected leases, found 1.7 trillion cubic feet (Tcf) *more* gas in these 31 leases than was re-

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[2] J.A. at 1-97. (J.A. refers to the Joint Appendix filed with the Court of Appeals below.)

[3] J.A. at 126-176.

ported by the American Gas Association ("AGA") as the total non-associated gas reserve additions for the more than 870 offshore Southern Louisiana leases for 1971 and 1972.[4] As a result of this finding, the Staff concluded that the reserve additions reported by AGA were understated by at least 54 percent.[5]

On June 21, 1974, just 11 days after this Court had rendered its decision in *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974), affirming a just and reasonable 26¢/Mcf area rate for new gas (with a 1¢ escalation in 1974 and a moratorium through 1977) and flowing gas rates of 22.275¢/Mcf and 21.3754 Mcf for onshore and offshore gas, respectively, the Commision issued Opinion No. 699 (App. C) in which it set a nationwide new gas rate of 42¢, with 1¢ per Mcf annual escalations, based on the untested industry data. In so doing, the Commission used the AGA reserve data on a nationwide basis despite its Staff's findings of a more than 50 percent under-reporting of such data in its spot check investigation.

Rehearing was denied by the Commission in Opinion No. 699-H (App. D), issued on December 4, 1974, in which it increased the nationwide rate from 42¢ to 50¢ based primarily on a methodology (i.e., the discounted cash flow approach) which it had expressly rejected in Opinion No. 699 as unworkable and unreliable, as well as unprecedented, and the Commission applied this 50¢/Mcf rate to *flowing* gas if fortuitiously the initial contract term had ended and a renewal contract was executed, and one of these events had occurred on or after January 1, 1973.

2. APGA filed its petition for review in the District of Columbia Circuit on December 4, 1974, which petition was later transferred to the Fifth Circuit. There-

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[4] J.A. at 166-167.

[5] *Id.*

after, on October 14, 1975, the Fifth Circuit, utilizing what it described as a "kid glove" standard of review, affirmed Opinion Nos. 699 and 699-H in their entirety (App. A at A-16-19). The court of appeals concluded, *inter alia*, (1) that no evidentiary hearing was required under the Administrative Procedure Act, but did not mention the procedural requirements of the Natural Gas Act (App. A at A-24-25); (2) that the new gas rate could be applied to flowing gas at the end of the initial contract term if a renewal contract had been entered into and if either the initial contract expired and/or the renewal contract was executed on or after January 1, 1973, even though contract expiration and renewal dates are irrelevant since the flowing gas must continue to be sold to the interstate market until Section 7(b) abandonment approval is obtained from the FPC (App. A at A-29-A-30); (3) that the net liquid credit, the one cost component which reduces the rate approved by the Commission, of 3.89¢/Mcf had sufficient record support even though the Commission admitted that the figure was understated (App. A at A-41; App. C at C-102); and (4) that the utilization of the DCF cost methodology was proper even though the FPC had rejected its use in Opinion No. 699 stating that its adoption would be "irresponsible" and had then made a complete about-face in Opinion No. 699-H, with no additional evidence before it, and approved the DCF methodology (App. A at A-36-A-37; App C at C-95, C-100; App. D at D-15-16).

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals to uphold the FPC's utilization of informal rulemaking procedures to set "just and reasonable" rates under the Natural Gas Act conflicts with the opinion of the District of Columbia Circuit in *Mobil Oil Corp.* v. *FPC*, 157 U.S. App. D.C. 235, 483 F.2d 1238 (1973), and is contrary to the explicit language of Sections 4, 5 and 19(b) of the Natu-

ral Gas Act, 15 U.S.C. §§ 717c, d and r(b) (App. E at E-1-4, E-9-10), which require "full hearings" resulting in "substantial evidence" in the record, and of Section 1.20(g)(1) of the Commission's Rules of Practice and Procedure (App. G, *infra*), which mandates that all parties "shall have the right of . . . cross examination" in hearings before the FPC.

The court of appeals below found that the FPC by permitting only the informal rulemaking procedures of Section 553 of the APA, 5 U.S.C. § 553 (App. F, *infra*), of initial and reply comments and by holding oral argument after Opinion No. 699 was issued (App. C at C-16; App. D at D-6-7) had complied with all procedural requirements (App. A. at A-24-25). It reached this conclusion without making any reference to the language of the Natural Gas Act or the Commission's Rules.

As noted above, the Natural Gas Act, i.e., the substantive statute, requires that when rates are set, "full hearings" must take place and these hearings must yield "substantial evidence" to support any Commission action in a ratemaking proceeding. As we show below, this statutory standard is the equivalent of a "hearing on the record" which this Court held in *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 238 (1973),[6] would trigger the hearing provisions of the Administrative Procedure Act, 5 U.S.C. §§ 556 and 557 (App. F, *infra*).

Section 553(c) of the APA (App. F, *infra*), which

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[6] This Court upheld the Interstate Commerce Commission's use of the informal rulemaking procedures of Section 553 of the APA in *Florida East Coast Railway*. However, the statute there under review required only that "the Commission shall give *consideration* to" various aspects of the railroad industry. The question on review was solely whether the ICC "considered" all of the factors it was supposed to in making its determination. The much more stringent requirement of "substantial evidence" was not involved, and therefore informal rulemaking procedures were deemed adequate. *See* Mobil Oil Corp. v. FPC, 483 F.2d at 1260-61.

sets forth the informal rulemaking procedures followed by the FPC in the instant case, states that "[w]hen rules are required to be made on the record after opportunity for an agency hearing, Sections 556 and 557 of this title apply instead of this subsection." That the Natural Gas Act, as a substantive statute calling for full hearings with substantial evidence, contains the equivalent of the hearing on the record standard is confirmed by the language of Section 706(2)(E) of the APA, 5 U.S.C. § 706(2)(E) (App. F, *infra*):

> The reviewing court shall— . . . hold unlawful and set aside agency action, findings, and conclusions found to be— . . . *unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute* . . . . [Emphasis supplied.]

Utilizing this reasoning, the D.C. Circuit in its *Mobil* decision held that the "substantial evidence" test, being a part of the actual language of the Natural Gas Act, as well as part of the APA, conclusively showed that Congress demanded a high degree of certainty concerning the facts upon which the FPC bases its ratemaking decisions,[7] and that court found that the "substantial evidence" requirement could not be satisfied under the informal rulemaking procedures of Section 553 of the APA.[8] Accordingly, the D.C. Circuit reached a conclusion completely opposite to that of the Fifth Circuit in the present proceeding:

> Informal comments simply cannot create a record that satisfies the substantial evidence test. Even if controverting information is submitted in the form of comments by adverse parties, the procedure employed cannot be relied upon as adequate. A "whole record," as that phase is used in this context, does

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[7] 483 F.2d at 1257-58.

[8] *Id.* at 1259.

> not consist merely of the raw data introduced by the parties. It includes the process of testing and illumination ordinarily associated with adversary, adjudicative procedures. Without this critical element, informal comments, even by adverse parties, are two halves that do not make a whole. Thus, it is adversary procedural devices which permit testing and elucidation that raise information from the level of mere inconsistent data to evidence "substantial" enough to support rates.[9]

Thus, it is not the APA which requires adversary procedures in this proceeding, but the Natural Gas Act's full hearings and substantial evidence requirements. The substantive statute determines *if* a party is entitled to an evidentiary hearing; the APA only tells which procedures such a proceeding must contain. As noted above at page 7, footnote 6, this Court concluded in *Florida East Coast Railway* that an evidentiary hearing was not there required because the substantive statute involved only provided that "consideration" be given by the ICC to various aspects of the railroad industry before a new rule is promulgated.

And in opinions rendered before the APA was passed by Congress, this Court held that the substantive statute controlled the right to an evidentiary hearing. For example, *Morgan* v. *United States*, 298 U.S. 468, 477-78 (1936), involved the Packers and Stockyards Act, 7 U.S.C. §§ 181-229, which required a "full hearing"; as a result, this Court held that "the statute itself demands a full hearing and the order is void if such a hearing was denied." This same conclusion was reached in *Interstate Commerce Commission* v. *Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91-93 (1913), which concluded that when a full hearing is required by a substantive statute, an evidentiary record must be compiled and cross-examination must be permitted. With the enactment of

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[9] *Id.* at 1260.

the APA, the minimum required procedural *content* of an evidentiary hearing was codified in Sections 556 and 557 thereof, but the *right* to a hearing emanates from the substantive statute, which in the present case is the Natural Gas Act and its requirement of "full hearings" and "substantial evidence."

However, if an agency through its own rules guarantees greater procedural rights than the APA or even the substantive enabling statute requires, those rules have the force of law, and the agency is bound to follow them. This Court has so held in a number of opinions beginning with *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 265-68 (1954), and *Service* v. *Dulles*, 354 U.S. 372, 388 (1957), and has most recently reaffirmed this conclusion in *United States* v. *Nixon*, 418 U.S. 683, 694-96 (1974).[10] Thus, even assuming *arguendo* that the "full hearings" and "substantial evidence" standards of the Natural Gas Act do not require an evidentiary hearing to be held, the FPC is still bound to hold an adversary hearing under Section 1.20(g)(1) of its Rules of Practice and Procedure (App. G, *infra*) which governs hearings and which states that "[p]arties . . . shall have the right of presentation of evidence, [and] cross examination. . . ."

The need for an evidentiary hearing is especially great in this proceeding in which the largest multi-billion dollar increase in the nation's history in producer rates was granted by the FPC through the arbitrary use of untested assumptions and methodologies which differ markedly from those approved on review of complete evidentiary records by this Court in *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974), and *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), and utilized in all prior area rate proceedings. In fact, in *Mobil*, decided just 11

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[10] *Accord*, Morton v. Ruiz, 415 U.S. 199, 235 (1974); Yellin v. U.S., 374 U.S. 109, 120-24 (1963); Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959).

days before the FPC issued Opinion No. 699 permitting a 42¢/Mcf rate, which was later raised to 50¢/Mcf in Opinion No. 699-H, this Court found just and reasonable (1) a 26¢/Mcf new gas rate with a 1¢ escalation in 1974, (2) lower rates for all flowing gas and (3) in the Southern Louisiana Area, moratoria on rate increases for new gas until October 1, 1977 and for flowing gas until October 1, 1976.[11]

Furthermore, the most important factor in the FPC's doubling of the rate approved in *Mobil* was its drastic reduction of the productivity figure which it based entirely on industry-supplied data including the AGA reserve data that the Commission Staff found to be understated by a minimum of 54 percent.[12] Even though the FPC agreed with the Staff's finding of significant understatement, it made only a 1.7 Tcf upward adjustment in the AGA reserve figure and accepted the remaining industry-provided data at face value (App. C at C-55-56, C-60-61)). This blind acceptance of whatever data the producers wish to provide in a situation where all of the relevant information is peculiarly and exclusively within the producers' possession, only serves to underscore the importance of permitting all parties to test and question this data through cross-examination of industry witnesses. Since consumers have no independent access to industry data, cross-examination is, as a practical matter, the only tool they have for getting at the truth.

2. The court below erred in not following the standard of review set by this Court in its prior Area Rate cases. Because there was no evidentiary hearing before the Commission in the instant case and only informal rulemaking procedures were followed, substantial evidence in the record is completely lacking to support Opinion Nos. 699 and 699-H. However, Section 19(b) of the Natural Gas Act requires substantial evidence for

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[11] 417 U.S. 298-299.

[12] J.A. at 166-167.

affirmance on review. As this Court held in *Mobil* and *Permian*, the court of appeals "must decide whether each of the order's essential elements is supported by substantial evidence." [13]

Thus, the court of appeals was forced to adopt a lesser standard of review than the substantial evidence test required by the Natural Gas Act in order to affirm the FPC's orders. The court of appeals admitted that but for the "kid glove" standard of review it was utilizing, Opinion Nos. 699 and 699-H would have to be set aside:

> We must express our regret, however, that the FPC continues to issue orders which would be inadequate but for our "kid glove" treatment. . . . Just as we must consider individual elements in our review of an FPC order to insure that it is supported by substantial evidence, so should the Commission examine the effect of each when it is deciding how to compose the rate structure initially. For over fourteen years the Commission has been experimenting in area rate regulation and yet it still "supports" many of the essential elements of its new national rate order with little more than *ipse dixit.* [App. A at A-19.]

One of the individual elements which could not have passed muster on review without the use of the "kid glove" review standard was the FPC's sudden adoption of the discounted cash flow ("DCF") methodology in Opinion No. 699-H, which accounted for the 8¢/Mcf increase to 50¢/Mcf therein (App. D at D-36-37) from the 42¢/Mcf level set in Opinion No. 699, where DCF costing had been rejected for lack of evidentiary support. Although the DCF had never before been utilized, the court of appeals stated that it would not "delv[e] into the complexities of an esoteric costing methodology which counsel could scarcely describe in their briefs or at oral

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[13] 417 U.S. at 309-10; 390 U.S. at 791-92.

argument." (App. A at A-36). Instead, the Court summarily accepted this new costing methodology which differed from that formulated after full evidentiary hearings and affirmed by this Court in both *Permian* and *Mobil*.

Obviously, the "complexities of an esoteric costing methodology" could be much better understood and supported or challenged if evidentiary hearings had been held to explore the propriety of adopting the DCF methodology. Instead, we are left with the spectacle of the Commission rejecting the DCF costing format in Opinion No. 699 because "[w]e are bound by the record that is before us, which lacks the necessary information for a reliable DCF cost estimate" (App. C at C-95) and "we believe that for the Commission to depart from the costing methodology it has used in all previous producer rate cases would be irresponsible at this final rulemaking stage" (*Id.* at C-100). Then, in Opinion No. 699-H, even though no additional evidence had been placed in the record, the Commission reversed its Opinion No. 699 conclusion and adopted the DCF methodology on the ground that "[w]e find that supplementary cost analysis necessary to assure that the rate allowed for new gas supplies adequately reflects the true cost of those supplies." (App. D at D-15). The FPC never attempted to explain what evidence it found in the record to support this 180° change in position, but the court of appeals affirmed the use of DCF costing anyway under the "kid glove" standard of review.

The one cost element which reduces the rate is the net liquid credit. In Opinion No. 699, the FPC set the net liquid credit at 3.89¢/Mcf on the basis of AGA data even though it admitted that "the recent increases in the prices paid for condensate cause this component of the cost analysis to be understated" (App. C at C-102). Having refused to hold an evidentiary hearing, the Com-

mission had no evidence upon which to set a proper net liquid credit, and the court of appeals conceded that "there is some merit in the charge that the evidence supporting the level [of the net liquid credit] set by the Commission is thin" (App. A at A-41). Nevertheless, once again utilizing "kid glove" review, the court of appeals approved of a Commission conclusion for which "substantial evidence" is lacking.

The "kid glove" standard of review applied by the Fifth Circuit was made "necessary" in this case because informal rulemaking procedures failed to compile a record to meet the substantial evidence requirement of Section 19(b) of the Natural Gas Act. The present case thus provides clear proof of the correctness of the conclusion of the D.C. Circuit in *Mobil Oil Corp.* v. *FPC*, 157 U.S. App. D.C. 235, 483 F.2d 1238, 1260 (1973), which the court of appeals below refused to follow (App. A at A-24), that

> Informal comments simply cannot create a record that satisfies the substantial evidence test . . . . Thus, it is adversary procedural devices which permit testing and elucidation that raise information from the level of mere inconsistent data to evidence "substantial" enough to support rates.

3. APGA also submits that the court of appeals' affirmance of the FPC's arbitrary abandonment, without any hearing, of the dual rate structure approved by this Court after full evidentiary hearings in *Permian* and *Mobil* for "new" and "flowing" gas must be reversed. Flowing gas costs are virtually all sunken and are therefore lower than new gas costs, but under the FPC's orders, flowing gas qualifies for the new gas rate when the original contract expires and a renewal contract is entered into, if one of these events occurs after January 1, 1973. Hence, the oldest, lowest cost flowing gas will be the first to qual-

ify for the new gas rate since these contracts will expire first.[14]

The stated purpose of this non-cost based, giant increase in rates for flowing gas is to provide an incentive to producers to expend more funds for exploration and development. However, by definition, there can be no incentive to produce and sell flowing gas to the interstate market since it is already being sold to interstate consumers and such sales may not be abandoned without the approval of the FPC in an abandonment proceeding under Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f (b) (App. E at E-5).

Since the Commission has attached no requirement that all or even any part of the monies collected above the present flowing gas rates must be invested solely in exploration and development for natural gas which must be dedicated to the interstate market, the producers are simply the recipients of windfall profits as beneficiaries of partial deregulation of the type struck down by this Court in *Federal Power Comm'n* v. *Texaco Inc.*, 417 U.S. 380 (1974). In that case, a Commission attempt to completely deregulate small producers was reversed because the unregulated rates would not be "just and reasonable". Here, partial deregulation up to a 52¢/Mcf rate is being permitted for all producers selling flowing gas under renewal contracts with no showing in this record

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[14] Any producer which requires special relief because its flowing gas costs exceed the applicable area flowing gas rate may apply for such relief under Section 2.76 of the Commission's General Policy and Interpretations, 18 C.F.R. § 2.76. However, under this section, the producer must not only prove excess costs, but must also show that an increase in gas supply will result from the grant of an increased price. Neither of these two criteria need be met to obtain the new gas rate for flowing gas under Opinion No. 699-H. Instead, the producer need show only the completely irrelevant occurrences of contract expiration and renewal, one of which must have occurred on or after January 1, 1973.

of any increase in flowing gas costs above the approximately 22¢/Mcf rate approved by this Court in *Mobil*.[15]

Permitting flowing gas to obtain the new gas rate without at the very least requiring that the excess profits received by the producers be expended on exploration for interstate gas supplies is contrary to this Court's holding in *Permian* that the rate set must be "the lowest possible reasonable rate consistent with the maintenance of adequate service and the public interest." [16]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 12, 1976

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[15] 417 U.S. at 298.

[16] 390 U.S. at 792-93; *accord*, Atlantic Refining Co. v. Public Service Comm'n of New York (CATCO), 360 U.S. 378, 388 (1959).

APPENDIX F

SECTIONS 553, 556, 557, and 706 OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §§ 553, 556, 557, and 706

5 U.S.C. § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of

reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

5 U.S.C. § 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386.

5 U.S.C. § 557. Initial decisions, conclusiveness; review by agency; submission by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of

subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 387.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

APPENDIX G

Sec. 1.20. Hearings.—. . .

(g) *Presentation by the parties.* (1) Parties and staff counsel shall have the right of presentation of evidence, cross-examination, objection, motion, argument and appeal. The taking of evidence and subsequent proceedings shall proceed with all reasonable diligence and with the least practicable delay.